



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2004

Ms. Lydia L. Perry
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2004-10944

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215915.

The Midlothian Independent School District (the "district"), which you represent, received a request for four categories of certain information pertaining to a specified district employee. You indicate that the district is withholding a small portion of the requested information pursuant to Open Records Decision No. 634 (1995).¹ You claim that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.026, 552.101, 552.102, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the requestor specifically excluded from the scope of his request the specified employee's social security number, home address, and family member information. Accordingly, this particular information is not responsive to the request for information and

¹ We note that in Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold information protected by the Family Educational Rights and Privacy Act ("FERPA") and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception to disclosure. Since the district has made a determination that this small portion of the requested information constitutes "student records," the district must comply with FERPA guidelines with regard to that particular information.

its public availability will not be addressed in this ruling. Consequently, the district need not provide the requestor with this particular information in response to this ruling.²

Next, we note that portions of the submitted information constitute mental health record information that is subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of the submitted information, we have marked the information that constitutes mental health record information that is subject to chapter 611 of the Health and Safety Code. Absent the applicability of a mental health record access provision, the district must withhold this particular marked information pursuant to chapter 611 of the Health and Safety Code.

You claim that portions of the remaining submitted information are confidential under FERPA. We note that section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov’t Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, “education records” are those records that contain information directly related to a student

² Accordingly, we do not address the district’s section 552.117 claim.

and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure “information in a student record at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). This office generally has treated “student record” information under section 552.114(a) as the equivalent of “education record” information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* 34 C.F.R. § 99.3 (“personally identifiable information” under FERPA includes, among other things, “[o]ther information that would make the student’s identity easily traceable”); *see also* Open Records Decision Nos. 332 at 3 (1982), 224 (1979) (finding student’s handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA), 206 at 2 (1978). Based on your arguments and our review of the remaining submitted information, we find that most of the information that you have marked under FERPA, as well as the additional information that we have marked, is confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA. However, we have marked portions of the information that you have highlighted under FERPA that do not constitute such personally identifiable information and that must, therefore, be released to the requestor.

You also claim that the information that you have submitted to us for review as Exhibit F is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.³ We note that a W-4 form is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). Accordingly, we conclude that the district must withhold Exhibit F pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

In addition, you claim that the information that you have submitted to us for review as Exhibit C is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides, “A document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. We note that this office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See id.* Based on your arguments and our review of Exhibit C, we agree that this information is confidential under section 21.355. Accordingly, we conclude that the district must withhold Exhibit C pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We also note that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has since concluded that other types of information also are protected from disclosure by the common-law right to privacy. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Based on our review of the remaining submitted information, we have marked the portion of this information that is protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Further, you claim that portions of the information that you submitted to us for review as Exhibit D are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) provides that a transcript from an institution of higher education maintained in the personnel file of a professional public school employee is excepted from disclosure pursuant to section 552.102(b), except for the information in the transcript pertaining to the degree obtained or the curriculum. *See* Gov't Code § 552.102(b). Accordingly, we conclude that the district must withhold Exhibit D pursuant to section 552.102(b) of the Government Code, except for the information in this exhibit pertaining to the curriculum and degree obtained.

Finally, we note that some e-mail addresses that we have marked within Exhibit E are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this section. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Based on our review of Exhibit E, we find that these particular marked e-mail addresses are excepted from

disclosure pursuant to section 552.137(a). Accordingly, we conclude that the district must withhold these addresses pursuant to section 552.137 of the Government Code, unless the individuals to whom they belong have affirmatively consented to their disclosure.

In summary, absent the applicability of a mental health record access provision, the district must withhold the mental health record information that we have marked pursuant to chapter 611 of the Health and Safety Code. The district must withhold most of the information that you have marked under FERPA, as well as the additional information that we have marked, pursuant to FERPA and section 552.114 of the Government Code. The district must release to the requestor the portions of the information that you have marked under FERPA that we have marked for release. The district must withhold the information that is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, section 21.355 of the Education Code, and the common-law right to privacy. The district must withhold Exhibit D pursuant to section 552.102(b) of the Government Code, except for the information in this exhibit pertaining to the curriculum and degree obtained. The district must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the individuals to whom they belong have affirmatively consented to their disclosure. The district must release the remaining responsive information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 215915

Enc. Marked documents

c: Mr. Matthew A. Jacob
The Dallas Morning News
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(w/o enclosures)